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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 404

THE COTTMAN COMPANY, A BODY CORPORATE, AND MARYLAND CASUALTY COMPANY, A BODY CORPORATE,

Petitioners,

VS.

UNITED STATES OF AMERICA

PETITIONERS' BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
1020 Court Square Building,
Baltimore 2, Maryland,
Counsel for Petitioners.

The Daily Record Co., Baltimore 3, Md.

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STATEMENT

Pursuant to paragraph 4 (a) of Supreme Court Rule 38, petitioners file herewith their brief in reply to the brief for the United States filed in December, 1951, in opposition to petition for certiorari.

ARGUMENT

I. Reply to the Argument of the United States that the Remission Power of the Secretary of the Treasury Under Rev. Stat. 3115 is Delegable.

Petitioners maintain that there is no Congressional authority for the delegation by the Secretary of the Treasury of his duties under Rev. Stat. 3115 with respect to remis-

sion of duties on expenses of vessel repairs. (brief in support of petition, pp. 14, 15). The Government does not dispute that the Secretary's authority to delegate is limited by 5 U. S. C. A. 281 b (a)* to his duties in respect of the importation of "merchandise."

Notwithstanding the opinion of the Court of Appeals that vessel repairs are "reasonably classified" as merchandise within the meaning of 5 U. S. C. A. 281 b (a) (R. 22), the Government on page 9 of its brief in opposition concedes that the dictionary definition of "merchandise" does not extend to vessel repairs. It is, however, argued by the Government that the vessel repairs embraced by Rev. Stat. 3115 have been expressly treated by Congress as being merchandise. In support of this argument reference is made to Section 498 (9) of the Tariff Act of 1922 and the amendment thereof by the Tariff Act of 1930. (brief for the United States in opposition, p. 9). While the Court of Appeals has agreed that those sections support the inference the Government seeks to draw (R. 22), petitioners submit that this reasoning will not bear analysis.

Section 498 (9) of the Tariff Act of 1922 authorized the Secretary to prescribe rules and regulations for the declaration and entry of merchandise within the provisions of Rev. Stat. 3114 and Rev. Stat. 3115. The amendment to Section 498 (9) effected by the Tariff Act of 1930 added, following the words "merchandise within the provisions of Section

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*"5 U. S. C. A. 281 b (a) The Secretary of the Treasury is authorized to confer or impose upon the Commissioner of Customs or any of the officers of the Bureau of Customs any of the rights, privileges, powers, or duties, in respect of the importation or entry of merchandise into, or exportation of merchandise from, the United States, vested in or imposed upon the Secretary of the Treasury by the Tariff Act of September 21, 1922, (ch. 356, 42 Stat. 858), or any other law." (This statute is erroneously referred to in petitioners' Brief in Support of Petition as 18 U. S. C. A. 281 (b).).

465 (Rev. Stat. 3114) and 466 (Rev. Stat. 3115) of this Act," the parenthetical phrase "(relating to supplies, repairs and equipment on vessels and railway cars)."

The Government's argument fails to take into consideration the fact that "expenses of repairs" is only one of several classifications referred to in Rev. Stat. 3115. Others are "equipments," "boats," "repair parts" and "materials." The latter may perhaps be said to be within the definition of "merchandise," but "expenses of repairs" are not. Inasmuch as there are items enumerated in Rev. Stat. 3115 to which the term "merchandise" as used in Section 498 of the Tariff Act of 1922 can sensibly apply, there is neither necessity nor justification for straining the definition to include items to which the term cannot sensibly apply. The addition of the parenthetical language by the Tariff Act of 1930 does not add any force to the Government's argument. That language beginning as it does with the words "relating to," is obviously intended to be merely descriptive of the subject matter of Section 465 and 466. It ought not be given any more significance than that, and certainly cannot justify the conclusion that anything in those sections which is not "merchandise" should become so. From the mere fact that Congress gave the Secretary authority to prescribe rules and regulations with respect to importation of merchandise in Rev. Stat. 3115, it does not follow that Congress intended to broaden the right to delegate conferred by 5 U. S. C. A. 281 b (a) to include items within Rev. Stat. 3115 which are not within the ordinary meaning of the term.

The inferences sought to be drawn are even more difficult to sustain in view of the definition of "merchandise" found in Section 401 of the Tariff Act of 1930 (Title 19 U. S. C. A.

1401 (c).).* It is provided there that "the word 'merchandise' means goods, wares and chattels of every description —." In enacting 5 U. S. C. A. 281 b (a) if Congress, by authorizing the delegation of duties in respect to importation of "merchandise," had intended to extend the meaning of that term beyond the meaning given it in the Customs Laws themselves certainly it would have more plainly said so.

If Congress did in fact omit to authorize delegation of duties with respect to expenses of repairs, as petitioners contend, this omission cannot be supplied by judicial decision.

Contrary to the Government's contention on page 12 of its brief in opposition the long-standing administrative construction of Title 5 U. S. C. A. 281 b (a) as permitting delegation and the fact that many cases have been disposed of on the basis of that delegation ought not to be entitled to "great weight" in these circumstances. The validity of the delegation need necessarily be questioned in this case only insofar as the delegated authority has been exercised with respect to items which are not "merchandise." To the extent that the delegated authority has been exercised with respect to items within Rev. Stat. 3115 which may be merchandise, such as equipments, boats or materials, its validity need not be determined here.

The effect, if any, of Reorganization Plan No. 26 of 1950 (referred to at page 13 of the Government's brief in opposition) is, of course, irrelevant here. In any event, petitioners question that it has been shown to have even prospective effect in this situation.

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* Section 401 of the Tariff Act of 1922 contained a similar provision, codified as 19 U. S. C. A. Section 231.

II. Reply to the Argument of the United States that Petitioners Had No Right to an Administrative Hearing on Their Petition for Remission Under Rev. Stat. 3115.

Petitioners concede that the Administrative Procedure Act does not in and of itself give rise to a right to a hearing, but contend upon the basis of the language used by this Court in *Wong Yang Sung v. McGrath,* 339 U. S. 33, 41, that Federal Courts are obliged to re-examine administrative matters in the light of the remedial purposes of the Administrative Procedure Act wherever the opportunity is presented. In that case, this Court upset long-established practices of the Immigration Service and in *Riss & Co., Inc., v. United States,* mem. 341 U. S. 907, 95 L. Ed 1345 reversing 96 F. Supp. 452, this Court overturned long-established practices of the Interstate Commerce Commission. The *Wong Yang Sung* case was decided on broad grounds and it is petitioners' contention that the decision is correctly interpreted as calling for a construction of statutes dealing with administrative matters so as to subject administrative action to the requirements of the Administrative Procedure Act wherever reasonable construction will allow, without regard to prior agency construction or the so-called doctrine of legislative approval.

Petitioners reiterate that they are entitled to a hearing as a matter of due process of law, but will not dwell further here on the unrealistic and technical construction of Rev. Stat. 3114 and Rev. Stat. 3115 required to sustain the Government's view that no constitutional right to a hearing exists under Rev. Stat. 3115. Without regard to that, however, petitioners say the language of Rev. Stat. 3115 fairly imports the need for a hearing. This Court is respectfully asked to compare the language of Rev. Stat.

3115 with that of Section 9 of the Immigration Act of 1917. The latter statute provided that *"if it shall appear to the satisfaction of the Secretary of Labor"* that any alien has been brought into the United States in violation of provisions declaring it unlawful to bring to the United States certain aliens afflicted with certain diseases and disabilities which might have been detected at the time of foreign embarkation by competent medical examination the person or transportation company bringing such alien to the United States shall pay a stated fine. In *Lloyd Sabaudo Societa Anonima v. Elting,* 287 U. S. 329, this Court construed that statute. At page 335 of 287 U. S. it was specifically pointed out that the statute did not involve constitutional rights. The language is certainly less indicative of the need for a hearing than is the language of Rev. Stat. 3115 which explicitly requires the Secretary of the Treasury to pass upon "evidence." Yet, while Section 9 of the Immigration Act of 1917 has been construed as contemplating a hearing (287 U. S. 329, 336) Rev. Stat. 3115 has, without judicial approval, been permitted to acquire (in the language of the Government's brief p. 16) the "definite gloss" that no hearing is required. Petitioners contend that the above comparison illustrates that the administrative interpretation of Rev. Stat. 3115 is not justified by the language of the statute and is erroneous. This case raises for the first time for judicial decision the question of whether the language of Rev. Stat. 3115 properly does or does not require a hearing. Petitioners maintain that it does and respectfully suggests that this Court so decide.

CONCLUSION

For the reasons stated above and in petitioners' brief heretofore filed in support of petition, the writ of certiorari prayed for should be granted and the decision of the United States Court of Appeals Fourth Circuit reversed.

Respectfully submitted,

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
Counsel for Petitioners.

December, 1951.